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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. [redacted] 105

FRED LEACH, doing business as Organo Product Company,
Appellant,

vs.

WILLIAM B. CARLILE, Postmaster,
Appellee.

APPEAL FROM CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

LEE D. MATHIAS,
P. W. SULLIVAN,
Solicitors for Appellant.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 448.

FRED LEACH, doing business as Organo Product Company, Appellant, vs. **WILLIAM B. CARLILE, Postmaster,** Appellee.	Appeal from Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

This is an appeal from a final order of the United States Circuit Court of Appeals for the Seventh Circuit affirming an order of the District Court for the Northern District of Illinois, dismissing the bill of complaint for want of equity and overruling a motion of the complainant below for a temporary injunction as prayed in the bill of complaint. (Rec., 281, 282.)

The cause was heard by the District Court upon the motion of the complainant for a temporary injunction and upon the motion of the defendant to dismiss the bill of complaint, and that court overruled and denied the complainant's motion and dismissed the bill of complaint upon the defendant's motion. (Rec., 282.)

There were no pleadings in the case except the bill of complaint, the exhibits thereto attached, the affidavits in support thereof, the motion of complainant for a temporary injunction, and the motion of the defendant to dismiss the bill of complaint.

The bill of complaint prayed for an order of injunction restraining the defendant from carrying out and executing a so-called fraud order of the Postmaster General.

The record discloses the following facts: The complainant was engaged in business under the firm name of ORGANO PRODUCT COMPANY, the business being that of selling a substance known as Organo Tablets which are composed of orchitic substance desiccated as its principal ingredient held together by sugar of milk as a binder. These tablets are useful, beneficial and effective for the treatment of nervous weakness, general debility, sexual decline, or weakened manhood, and for persons suffering from nervous disorders. Orchitic substance desiccated is prepared from the testicles of animals and in common parlance is known as testicular extract and is one of the remedies developed during the last twenty-five years by scientists who have made a study of the ductless glands in remedial medicine, and who have developed the science of Organotherapy. This substance is manufactured by the leading pharmaceutical manufacturers of the world, and is known under divers scientific names; in England as didymin, in Germany as testikulin, in Switzerland as sequarin, in Russia as spermin, in Italy as orchipina, in France as orchitin, and in the United States as orchic substance and also by other names. The firm of Burrows, Welcome & Co., the leading pharmaceutical manufacturers of England, in their catalogue and other publications advertise it as "didymin (testicular substance)," and publish concerning it the following: "This substance has been used in premature senility, neurasthenia, locomotor ataxia and

sterility." Parke, Davis & Co., of Detroit, in their catalogue and other advertisements of their products describe it as "orchic substance, desiccated," and in such publications say with reference thereto: "Indications: neurasthenia, diabetes, hypertrophic prostatitis, impotence, hysteria, hystero-epilepsy, and as a aphrodisiac. Beneficial effects have been observed in eczema, psoriasis, and obesity. Dose, one to five grains is the usual initial dose, to be increased *pro re nata.*" The substance is also manufactured by Armour & Co., and other large packers and by numerous pharmaceutical manufacturers in the United States and other countries, and is carried by druggists for use in filling prescriptions and is indicated in leading works on materia medica as a medicine to be used with reference to the aforesaid ailments, and has been known for many years as a useful, beneficial and effective remedy in the treatment of such physical disorders. (Rec., 3, 4.)

The record further shows that the appellant had built up a large and extensive business in selling said substance for the treatment of such physical disorders, and has received in connection therewith through United States mail large sums of money exceeding five thousand ($5,000) dollars per year. (Rec., 4.) The bill alleges "that said business is a legal and legitimate business conducted according to business and legal methods and opinion and is founded largely and almost exclusively upon the proposition that the said orchic substance is a useful, beneficial and successful remedy in treating, curing, benefiting and remedying persons suffering from said physical disorders; that hundreds of persons who have purchased said substance from your orator have been greatly benefited or cured of such physical disorders by the use thereof." (Rec., 4.) The record further shows that in the sale of said substance the appellant used four advertisements,

viz: a booklet entitled, "Are You 100 Per Cent Efficient?" (Rec., 12), a letter (Rec., 13), a printed copy of testimonials (Rec., 15), and an order blank (Rec., 17), and that the matters and things stated and set forth in said advertising matter are true. (Rec., 5.)

The record further shows that in April, 1919, the solicitor for the postoffice department issued a citation to the complainant to show cause why a supplemental fraud order should not be issued against the appellant (Rec., 19-21); that an answer was made to such citation in writing (Rec., 21-28), and the matter came on for hearing upon the said citation and answer on May 20, 1919 (Rec., 50), when evidence was heard in support of the citation and in support of the answer, all of which is attached to the bill of complaint as exhibits, and made a part thereof.

The bill of complaint further alleges that notwithstanding the fact that the charges made by the Postmaster General were shown by the evidence to be untrue, and notwithstanding the fact that there was no evidence presented to the Postmaster General tending to prove that the said charges were true, the Postmaster General under date of August 15, 1919, arbitrarily signed, addressed and caused to be delivered to the postmaster at Chicago a communication forbidding him to pay any postal money order drawn to the order of the Organo Product Company and directing him to inform the remitter that the payment of such postal money order had been forbidden and that the amount thereof will be returned upon the presentation of the original order or duplicate thereof, etc., and directing the postmaster to stamp all such mail with the words "Fraudulent, mail to this address, returned by order of Postmaster General," and return the same to the senders, etc.

The charges contained in the momorandum recommending the issuance of said citation were to the effect that the

appellant was conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of Sections 3929 and 4041 of the Revised Statutes as amended, by leading "persons to believe *that by the use of Organo Tablets lost manhood can be restored irrespective of the cause of the trouble or the condition of the patient;* whereas, in truth and in fact, as said party well knows, the use of said preparation will not bring about said results, but the said party so represents for the sole purpose of obtaining the aforesaid remittances." (Rec., 20, 21.) There was no evidence whatever to support this charge.

The bill further alleges "that the said order of the said Postmaster General is not based upon any evidence tending to prove the charges preferred in said memorandum, but is based solely upon the opinion of the said Postmaster General, that the said Organo Tablets did not bring about the results set forth in the aforesaid Exhibits A, B and C (which are copies of said advertising matter), which said opinion is not supported by scientific authority, but on the other hand is erroneous; your orator further alleges that the said order of the said Postmaster General is merely a matter of opinion on the part of the said Postmaster General." (Rec., 9.)

The bill further alleges that the complainant had not been engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises as set forth in said memorandum, *and that he never represented that lost manhood could be restored irrespective of the cause of the disability or the condition of the patient as set forth in said memorandum,* and that there was no evidence whatever presented to or considered by the Postmaster General prior to issuing the aforesaid fraud order tending to show that the complainant made such representations,

that the only representations made by the complainant with respect to said Organo Tablets were those contained in said advertising matter and that the said representations are true in substance and in fact, and that the business of complainant has been conducted truthfully in the honest belief that the said Organo Tablets are a valuable and successful treatment for said physical disorders and without any intention to cheat, wrong or defraud any person, and that the complainant had received hundreds of letters from persons who have used said treatment setting forth and confirming the opinion of complainant that the said Organo Tablets are a valuable and successful treatment for the aforesaid purposes. The bill of complaint also contains allegations of irreparable injury and prayed for an injunction *pendente lite* and for a permanent injunction to restrain the execution of said fraud order. (Rec., 10, 11.)

The record further shows that prior to the time the complainant was engaged in business under the firm name of Organo Product Company he was doing business under the firm name and style of Packers Product Company, selling the same substance under the name of Orchis Extract (Rec., 21, 22), and using as advertising matter a booklet entitled "The Rising Curtain" (Rec., 250), a letter (Rec., 251), and a printed copy of testimonials (Rec., 255); that a fraud order was issued by the Postmaster General with respect to said business and a bill for injunction filed by appellant in the court below to restrain the execution of that fraud order, that an answer was filed to that bill of complaint (Rec., 257), and that matter then came on for hearing upon the bill and answer and affidavits before his Honor Francis E. Baker, sitting as a judge of the District Court, and that Judge Baker after hearing arguments of counsel, rendered the following memorandum opinion (Rec., 22):

"Guided by the teachings in the case of *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, at pages 104-107, inclusive, it seems clear to me that the question of efficacy of orchic extract would be a matter of opinion, quite like those differences of opinion between the allopathic and homeopathic schools of medicine respecting the efficacy of their divergent remedies, if the complainant in his booklet had confined himself within the range of opinion of those members of the medical profession who have experimented with and used testicular extracts. But on pages four and five of the advertising booklet appear declarations of positive and actual results which go beyond the recognized opinion. In other parts of the book I find statements which seem to evince a willingness on the part of the complainants to misrepresent or at least to permit the reader to deceive himself respecting the size and character of complainant's place of business. I also note that the complainant has taken for the name of his product the generic name which the medical profession applies to all testicular substances, and thereby gives the impression that the complainant's substance is the one which has been used and prescribed by physicians generally. These latter matters I take as merely corroborative of the essential misrepresentations of the positive and actual results obtained by the use of the complainant's compound.

I therefore find that there was a basis in the record before the Postmaster General on which the order may be sustained and that it is beyond any proper exercise of judicial power to nullify the order on the ground that nothing was involved except expression by the complainant of a *bona fide* opinion which he was justified in holding.

"The defendant's motion to dismiss the bill is sustained." (Rec., 22-23.)

After rendering this opinion an arrangement was made between court and counsel in that case by which the order dismissing the bill was not to be entered until counsel for complainant had an opportunity to go to Washington to endeavor to adjust the matter with the Postmaster

General. (Rec., 23-26.) In the discussion with respect to that arrangement his Honor Judge Baker said:

> "Pretty close case, pretty narrow foundation there to sustain this order on. I think it is sustainable and I am compelled to sustain it, but the product itself is not like the syrup of figs and some other things that were held to be fraudulent in and of themselves, where a man is representing he is getting out syrup of figs and there is no syrup of figs in it. It isn't anything of that sort. It is dealt in by reputable firms like Armour, and Parke, Davis. The only way I am sustaining the Postmaster General is on these places where I have found the man has stated positively things that go beyond any justifiable range of opinion as expressed in the medical authorities in his favor. Of course, there are medical authorities the other way, among them the fellow who was before the Postmaster General and who says the whole thing is bunk. He can have an opinion the other way to come within the *McAnnulty* case. If he didn't go any further than the physicians who entertain opinions on his side, saying that the medical science justified it, but because he did go beyond that I am declining to set aside the Postmaster General's order. I may be mistaken about it. The question is close enough." (Rec., 25.)

Pursuant to the arrangement made with court and counsel for the government, counsel for appellant went to Washington and discussed the situation with the solicitor for the Postoffice Department and his assistants, and while counsel for appellant was not successful in obtaining the mail addressed to the Packers Product Company, there was discussed and pointed out the objection to the advertising matter of the Packers Product Company, and counsel for appellant stated to the solicitor of the Postoffice Department and his assistants that all objectionable parts of the advertising matter of the Packers Product Company would be eliminated from future advertising, that the name of the company would be changed to Organo Product Company, and that pictures of the stock-

yards would be eliminated from the advertising. (Rec., 26.)

Subsequently the complainant started into business again under the name of Organo Product Company, changed his advertising so as to eliminate all the objections that had been suggested in the trial of the case before Judge Baker, and by the attorneys for the Postoffice Department and the Government, and continued to engage in his business in a lawful and legitimate manner and to use the United States mails for that purpose until the fraud order was issued, the execution of which the complainant is seeking to enjoin in the present proceedings. (Rec., 26, 27.) Such new advertising matter before it was printed for the complainant was submitted to members of the medical profession and approved by them from a medical standpoint of view and to legal counsel and approved by them so far as the law was concerned. (Rec., 26, 27.)

Attached to the bill of complaint and made a part thereof are numerous exhibits containing all the evidence considered by the Postmaster General, all of which exhibits were before the Postmaster General and a part of which are the following: Two affidavits of Dr. James L. Church, a physician practicing in Chicago since 1905, to the effect that he is familiar with the standard works on the subject of Materia Medica and Therapeutics, and that such works recognize orchitic substance as a useful and effective remedy in the treatment of nervous disorders and sexual weakness and that he is of the opinion that orchitic substance is a useful and effective remedy for nervous disorders and sexual weakness and that he has read the booklet entitled, "Are You 100 Per Cent Efficient?" found on page 12 of the record, and that in his opinion the matters and things stated in said booklet are true in substance and in fact. (Rec., 29.) On pages 30-50 of the record are

copies of letters, omitting the signatures, of numerous persons re-ordering said remedy and stating that they have been benefited by the treatment. The originals of these letters were submitted at the hearing before the Postmaster General for verification as to the correctness of the copies. These testimonials were all unsolicited and were made volutnarily by persons who had been benefited by the treatment and who wished to continue it. On pages 223-241 of the record are condensed reports of seventy (70) physicians residing in seventy (70) different cities who have treated their respective patients with Organo-Therapeutic Compounds containing orchitic substance, and who report great improvement in the condition of the patient or cures of various ailments, including neurasthenia and sexual weakness.

The pioneer work of Brown-Sequard, the eminent French physiologist, in administering to himself extracts of testicles, awakened a profound interest among scientific men in the study of Organo-Therapy. (Rec., 197, 209.) Dr. Henry R. Harrower in his work entitled, "The Internal Secretions in Practical Medicine," published in 1917 (Rec., 215-223), with respect to Organo-Therapy, says:

> "Undoubtedly the most radical as well as important advance in medicine is our better knowledge of the endocrine system—that interlocking though widely separated collection of glands of internal secretion which we know is in supreme control of growth, both physical and mental; metabolism; the sympathetic nervous system, with its regulations of vascular tone and blood pressure as well as the indefinite and complex factors gathered together into the once well-known term 'Constitution.' The hormones produced by these wonderful glands are secreted into the blood and serve to correlate functions and harmonize many of the widely differing functions of the body. Their chemical messages are of such a nature that to ignore them and their subtle in-

fluence is to miss a very large and important part of the information which may be at the disposal of any observant physician. * * * By far the greatest principle is that of 'homostimulation,' which is included in what has come to be known as Hallion's Law which is as follows: 'Extracts of an organ exert on the same organ an exciting influence which lasts for a longer or shorter time. When the organ is insufficient it is conceivable that this influence augments its action and when it is injured, that it favors its restoration.' This has been demonstrated experimentally and clinically so many times, that it is almost axiomatic, though it is not infallible, and may still be criticized occasionally by some. Granting what Hallion has said, functional insufficiencies of many of these organs may be expected to be favorably influenced by giving suitable doses of the corresponding gland secured from animals. * * * Sex disabilities must needs be considered as resulting from internal secretory disorder because the sex manifestations are so absolutely under the regulation of the endocrine system. Not only do the gonads (testicles) bring about their subtle influence upon feature, form and functions; but they themselves are played upon by the other ductless glands, and I do not think that there is a single endocrine disturbance effecting any of the glands of internal secretion that does not have as its syndrome some direct or indirect effect upon the gonads and their work. * * * Quite the most important phase of Organo-Therapy in dysgenitalism is the use of extract of organs corresponding to those affected—the ovaries or testes, as the case may be. * * * If functional impotence in the male as well as in the female is considered in the light of an endocrine dyscrasias, there is more hope of a successful outcome than from all the electrical, mechanical and psycotherapeutical procedures combined. The principle of homo-stimulation oft referred to in my writings applies just as much to the gonads as to the thyroids, pituitary or any other gland of internal secretion, and the clinical results following the use of didymin, sequarine, hormotone, or the Roberts-Hawley Lymph or any other preparation calculated to stimulate the sex glands to a greater functional activity are based upon good phys-

> iology and sound reasoning, many statements to the contrary notwithstanding. * * * Let us consider for a moment the philosophy of the last of these proprietaries. Unnumbered cases of so-called incompetence have been treated with this lymph. I have personally used it in my practice and am certain that this homostimulation action is the physiological explanation of the good results that one can expect to secure following its judicial use in cases of this character. * * * The beneficial effects from this kind of treatment seem to originate from the augmented gonad activity for this alone is sufficient to increase metabolism, create force (the testicular hormone has been called 'a dynamogenic hormone') and to start up a greater degree of functional activity in the other interrelated endocrine organs."

Dr. Arnold Lorand, the eminent physician of Carlsbad, Austria, in his work entitled "Old Age Deferred," recently published, devotes a chapter "On the Influence of the Sexual Glands upon Vitality and Long Life." (Rec., 189, *et seq.*) This is an extremely interesting and learned chapter and bears out everything that is stated in the advertisements of the complainant.

Dr. Ivo Geikie Cobb in his work entitled "The Organs of Internal Secretion; Their Diseases and Therapeutic Application; A Book for General Practitioners," published in 1917 (Rec., 206 *et seq.*), also contains an interesting scientific discussion, and among other things, says:

> "Without going further into the physiology of the testicle it is sufficient to say that there can be very little doubt that these organs play a very vital part in the production of secretions, which, although we are ignorant of their full importance, are necessary for the development of the normal man; not only in so far as sexual characteristics are concerned, but even with regard to the adequate workings of his nervous system. * * * Let us commence our study by considering the help which may be given to that very widely encountered disease, neurasthenia. It has been conclusively proved that the exhibition of some preparation of the testes (such as spermin)

has the power of raising the amount of muscular work available, of increasing the strength of the individual, and of banishing ready fatigue. * * * The extent of these results is undoubtedly due to the stimulation action of the testicular hormone upon the endocrimus system as a whole, and as a means of revitalizing an individual with deficient oxidation, poor nutrition, nervous inactivity, and general weakness, the system is of undoubted value. There are few single remedies which can compare with active and properly prepared testicular extracts. * * * Extracts of the gonads, which are sometimes manufactured in combinations with extracts of the central nervous system, will be found to have a wide applicability. Thus, in neurasthenic cases, in patients who are run down, and in delayed convalescence, they are frequently of the greatest use. * * * Orchitic extract is given in doses ranging from two to four grains according to the individual preparation."

Dr. H. Batty Shaw, in his recent work entitled "Organo-Therapy" (Rec., 200, *et seq.*), also supports the statements made in the complainant's advertising matter. Dr. Shaw is an eminent English authority on the subject. With reference to the dosage of various testicular preparations, Dr. Shaw says:

"Dosage—Solutions can be obtained for hypodermic injections in quantities of 1-3 c. cm. or by eight 2.0-3.0 grammes up to 8 grammes. Orchitin may be given by the mouth in doses of 0.5, 0.8 or 3.0 grammes in twenty-four hours. Tabloids of didymin (5 grains) may be given, 1 to 4, three or four times a day; dried pulverized testicular substance, one part corresponding to six parts of the fresh organ, may be given in 1 to 2 gramme doses daily, and opoorchidinum in 5 to 8 gramme doses, three times a day."

The foregoing treatises on Organo-Therapy were offered in evidence on behalf of the complainant at the hearing before the solicitor for the Postoffice Department on the citation to show cause why a fraud should not issue and were made a part of the bill of complaint

With the hope of sustaining the government's position at the hearing before the solicitor for the Postoffice Department upon the citation to show cause why a fraud order should not be issued, the government offered the testimony of four witnesses and the deposition of Dr. Reede, the effect of which was merely that these witnesses were of the opinion that orchic substance had no therapeutic value whatever.

The first witness was Dr. L. F. Kebler, an employe of the government at Washington in the examination of drugs and foods in the drug laboratory in the Bureau of Chemistry. (Rec., 66.) Dr. Kebler admitted on his direct examination that some physicians prescribed testicular substance (Rec., 77), and expressed himself as being of the opinion that testicular remedies were of no value. It appeared, however, on cross-examination, that he had had a very limited experience as a practicing physician (Rec., 81); that he had never used testicular extracts and that there never came under his observation any patients who had been treated with testicular extracts (Rec., 85), that he had never treated a man for impotence, that he did not know what the chemical hormone secreted by the testicle was, and that that chemical hormone had not been isolated by chemists, and that not knowing its chemical composition he did not know whether or not it could be absorbed from the intestinal tract (Rec., 88); that he was ignorant of the modern bibliography on the subject of Organo-Therapy, and that he could not point out any statements contained in the advertisements of the complainant which were false. He simply relied upon his immature opinion that testicular substance was of no benefit in medicine.

The next witness was Dr. Gleason C. Lake, employed in the United States Health Service (Rec., 107), who had very little clinical experience. (Rec., 108.) He was

of the opinion that orchitic substance had no medicinal value. He testified that he had never analyzed the testicles of an animal (Rec., 119), that he did not know what the chemical hormone secreted by the testicle was, that he had never attempted any treatment based on Organo-Therapy, that the chemical hormone secreted by the testicles had not been isolated, that not knowing its chemical composition he did not know whether it could be absorbed, that he had never used testicular preparations, that he had never treated any patient for impotency, and that his conclusion was a mere matter of opinion (Rec., 143), that he had not studied the sum total of all the work that had been done in the use of orchitic substance.

The next witness was Dr. Roy Graham Hoskins, a physiologist and not a physician, employed in the office of the Surgeon General. (Rec., 148.) On his direct examination he testified that the remedy in his judgment had no value, but his explanation of his answer showed that he did not know whether or not it had any value and he admitted that

> "there is some literature indicating that testicular material in large doses is beneficial in the condition of impotency. Dr. Victor D. Lespinasse of Chicago has had experience along this line and has reported an article in the surgical clinics of North America, 1918, Vol. II, that in large doses testicular extracts have been reported by some investigators to have a beneficial effect." (Rec., 153.)

On cross-examination he testified he never practiced medicine (Rec., 156), that he had never treated any patients suffering from diseases of the endocrine glands, that he had never made any personal observations of the effect of the treatment of patients by testicular extracts (Rec., 157), that he did not know whether there is a hormone in the testicles (Rec., 159), that if there is a hormone in the testicles and an individual is suffer-

ing from a deficient testicular hormone and the hormone were introduced into his blood stream through the stomach or otherwise in an unchanged condition in sufficient amount he would supposedly be beneficially affected (Rec., 160); that he believes in the theory of Organo-Therapy in a limited way (Rec., 163); that he had never made a dissection of the testicles (Rec., 166); that he never treated anyone with orchic extract. (Rec., 167.)

The next witness was Dr. Frank Abbott, connected with the United States Public Health Service in Washington. (Rec., 174.) Dr. Abbott testified that in about 1891 or 1892 after Brown-Sequard had published the results of his experiments with testicular extract he accompanied Dr. John M. Byron, who made some experiments with testicular extract at the Home for Incurables on Blackwell's Island. He injected testicular extract in a man who had been paralyzed and with reference to this case Dr. Abbott testified:

> "He was paralyzed, but he had a peculiar form of paralysis; he was blind, and he had not eaten any solid food for some period of I think about three years. After the tenth hypodermic injection of about ten C.C. of testicular fluid prepared after Brown Sequard's method he expressed himself as one wanting to get up, and he did get up, and he got out of bed. He walked around the bed and the next day he walked around the hospital and he ate a good square meal of roast beef and salad and pie. I remember it because he died the next day." (Rec., 175.)

Testicular extract cured him of his paralysis, but salad and pie killed him. The doctor further testified that he thought testicular extract administered by the mouth would not accomplish any good results. (Rec., 176.) On cross-examination he testified that he had treated a number of cases with testicular substance for impotency but that he effected no cures, but that in some instances he

observed a psychic effect. He further testified that he knew two or three score doctors who treated impotency with testicular substance. (Rec., 180.)

Dr. Edward H. Reede's deposition had been taken by Dr. Kebler on a hearing formerly involving the Packers Product Company and not the Organo Product Co. It was offered in evidence before the Postmaster General by the government. Dr. Reede testified that favorable results had been reported during recent years by the administration of what might be called testicular extract. (Rec., 243.) He also testified that certain preparations of powdered testicles were being used by many men but only as an experimental step (Rec., 245-246), and that "at present the preparation of testicular substance in tablet form is being put on the market by Armour & Co., of Chicago, and it is being used by physicians," and that

> "those physicians of us who are working most intensively with the glands of internal secretion believe that the adult testicle possesses two distinct functions, resident in two distinct types of tissue or cells of Sertoli which are concerned in the production of the actual spermatic elements which are concerned in reproduction. This substance which would form the major part of a powdered substance of the gland sacks has no internal effect. The other type of tissue composed of the cell of Leydig are believed to have a secretion which is discharged within the body and which is very powerful in the growing child, which also continues to be potent in the adult in maintaining a certain integration among the ductless glands of the body and which we believe exerts its action through an as yet unisolated substance hyperthetically called hormone."

The foregoing testimony which was contained in one of the exhibits to the bill of complaint in no respect disproved any of the statements contained in any of the advertisements of the complainant and the most favorable interpretation which can be given to it in behalf of

the defendant is to show as his Honor Judge Baker has held that the value of orchitic substance as a remedy is a mere matter of opinion.

The errors assigned in the Circuit Court of Appeals were as follows (Rec., 284):

1. The court below erred in overruling the motion of the complainant herein for a temporary injunction as prayed for in the bill of complaint.

2. The court below erred in not entering an order herein granting to the complainant the temporary injunction as prayed for in the bill of complaint, and in the motion of complainant filed herein.

3. The court below erred in dismissing the bill of complaint in this cause for want of equity.

4. The court below erred in dismissing the bill of complaint in this cause.

The errors assigned here are:

1. The United States Circuit Court of Appeals erred in affirming the judgment of the court below.

2. The United States Circuit Court of Appeals erred in not reversing the judgment of the court below.

3. The United States Circuit Court of Appeals erred in not reversing the judgment of the court below and directing that an order for injunction issue as prayed for in the bill of complaint.

4. The United States Circuit Court of Appeals erred in not reversing the judgment of the court below and directing the entering of a decree as prayed for in the bill of complaint. (Rec., 301-302.)

BRIEF OF ARGUMENT.

The courts have jurisdiction to re-examine and review the action of the postmaster general in matters of this kind when he is acting without authority of law or in excess of the power granted to him by law, or has proceeded in violation of an act of Congress or has misconstrued the legal effect of the statute under which he is acting.

American School of Magnetic Healing v. *J. M. McAnnulty*, 187 U. S. 94.

Lewis Publishing Co. v. *Wyman*, 152 Fed. Rep. 787, 791.

People's United States Bank v. *Gilson*, 161 Fed. Rep. 286.

Upon a motion to dismiss a bill of complaint for want of equity appearing upon the face of the bill the material facts averred in the bill are to be taken as admitted.

American School of Magnetic Healing v. *J. M. McAnnulty*, 187 U. S. 94.

Where the effectiveness of a medicinal remedy is a mere matter of opinion the postmaster general has no legal right to prohibit the delivery of letters addressed to a firm dealing in such remedy merely because he may have an opinion adverse to the remedy and in conflict with the opinion of scientific men. The postmaster general exceeded his authority in this respect in this case.

American School of Magnetic Healing v. *J. M. McAnnulty*, 187 U. S. 94.

The postmaster general had no right to issue the fraud order involved in this case because there was no evidence

before him tending to support his conclusion that the complainant was engaged in a scheme to defraud, by the use of the mails, under the provisions of sections 3929 and 4041 of the revised statutes as amended.

American School of Magnetic Healing v. *J. M. McAnnulty*, 187 U. S. 94.

The foregoing principles relate and apply to all the errors assigned by the appellant and to the facts as stated in the foregoing statement, and as shown by the record.

ARGUMENT.

We feel that it would be imposing upon the intelligence of the court to attempt to amplify the application of the foregoing principals to the facts of this case. We are justified, however, in referring to the opinion of the Circuit Court of Appeals (Rec., 293 *et seq.*) for the purpose of pointing out that numerous quotations of advertising matter contained in the opinion are in some cases incorrect and in others incomplete. These quotations are arranged in such manner in some cases as to give an erroneous impression of the real substance of the representations contained in the advertising matter used by the appellant.

To illustrate: The word "*Neurasthenia*" quoted in the opinion (Rec., 297) was the first word of a sentence defining what neurasthenia is. (See page 2, Exhibit A, Rec., 12.) The words "What a wonderful sensation" are the first part of a sentence describing the sensation experienced when the blood returns to an arm which has been held in an upright position for considerable time. (See page 10, Exhibit A, Rec., 12.) The words "Sexual Power is Seldom Lost" are the heading of a paragraph which explains that such is the case "except as a natural result of old age or certain diseases." The opinion incorrectly quotes the statement that "Every year hundreds AND thousands are added to the already long list of men who suffer from lack of manly strength," by changing the words "*and*" to "*of*" (Exhibit A, page 16, Rec., 12), thereby changing the meaning. Also sentences are picked out from different parts of the pamphlet and rearranged in the opinion so as to give a different significance.

A careful examination of the advertising matter shown by the record discloses the fact that every statement therein contained is reasonably supported by the bibliography of organo-therapy and are such that a truthful man who believes in the treatment of nervous and sexual disorders by the application of organo-therapeutic remedies would naturally make. The appellant was not only sustained in his belief by sound scientific principles but was confirmed in it by the reports he had received of the success of the articles sold by him in effecting cures. Fraud is not to be presumed, but must be proven. The fact that appellant believed that organo tablets would have the effect which scientific men claimed for them and the fact that the representations made by him were supported by scientific authority and the fact that the parties who purchased them reported successful treatments with them is no proof of fraud even if the postmaster general did not entertain the same confidence. That the appellant had no fraudulent intent is evidenced by the fact that his advertising booklet (Exhibit A; Rec., 12), was prepared after conference with the postmaster general's office subsequent to Judge Baker's decision in the Packers' Product Company case (Rec., 22, 23), and was submitted to counsel to avoid any possibility of misrepresentation. (Rec., 26.)

It is respectfully submitted that the judgment of the court below should be reversed and that the District Court should be directed to enter a decree for an injunction as prayed for in the bill of complaint.

Lloyd Mathews

P. V. Sullivan

Solicitors for Appellant.